a

RE J RAJU JAYARAMAN M KERPAYA, EX P OCBC BANK (M) BHD

HIGH COURT MALAYA, PULAU PINANG
ZALEHA ZAHARI J
[BANKRUPTCY NO: 29-1021-1989]
b 20 SEPTEMBER 1999

BANKRUPTCY: *Practice and procedure - Stay of proceedings - Application for - Exercise of court's discretion - Factors to be considered - Whether any special circumstances justifying a stay - Section 97 Bankruptcy Act 1967*

c This was an appeal against the order of the senior assistant registrar who granted the judgment debtor's two applications for a stay of bankruptcy proceedings, marked as encls 36 and 46 respectively, pending the determination of various suits and applications filed by the debtor to set aside an order for sale of property dated 16 July 1987 (*ie*, Suit No. S3-22-583-92 and Civil d Appeal No. W-02-642-95) charged as security for a loan granted to one Kredin Sdn Bhd for whom the debtor was one of two guarantors.

The judgment creditor submitted that the order for stay was inappropriate because the debtor failed to show "sufficient reason" as required under s. 97 e of the Bankruptcy Act 1967 and that the said enclosures were bereft of *bona fides* and totally without merit. It was contended that the debtor had filed a third application for stay, encl 39, which the debtor chose to pursue although filed six months later than encl 36 based on the premise that the security of charge would have satisfied the debt, the antithesis of requiring a stay pending f the determination of a suit to set aside the order for sale which was one of the three grounds cited in encl 36.

The court's attention was drawn to the fact that to date, the debtor had successfully prevented the creditor from realising the properties charged as security for the judgment debt by obtaining injunctions and stays under new g suits filed to set aside the order for sale. It was argued that the proposition for a stay pending the determination of the suit to set aside the order for sale should not be accepted when the said suit had no bearing and was irrelevant to the bankruptcy proceedings. In any event, both Suit No. S3-22-583-92 and Civil Appeal No. W 02-642-95 had already been concluded when the Court h of Appeal ruled that the matter was *res judicata* and struck out Suit No. S3-22-583-92.

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The debtor submitted that the institution of bankruptcy proceedings was premature as the money allegedly due to the creditor could be recovered after the auction of the charged properties which would leave a surplus of more than RM70,000,000. That a proper construction of the security documents would show that the creditor's claim was wrong, in breach of contract and that the debtor, as guarantor, was only liable for the shortfall after the sale of the properties. It was also argued that the debtor could not be accused of "obstructing" the creditor when he was merely exercising his legal right to challenge the judgment for fraud and unjust enrichment.

Held:

[1] Enclosure 46

[a] As the Court of Appeal had allowed the creditor's appeal and further directed Suit No. S3-22-583-92 to be struck out pursuant to O. 18 r. 19 Rules of the High Court 1980, the basis for a stay of this bankruptcy petition on this ground had been extinguished. An order of stay on this ground was therefore no longer sustainable.

[2] Enclosure 36

[a] Stay pending determination of Suit No. S3-22-583-92

Effect must be given to the Court of Appeal's decision in allowing the creditor's appeal in W-02-642-95. Thus, to all intents and purposes, Suit No. S3-22-583-92 had effectively been disposed of and a stay of this bankruptcy petition pending the determination of a suit which had already been disposed of was also no longer sustainable.

[b] Stay pending determination of OS No. 31-1069-86

An order in terms of this originating summons was granted on 16 July 1987 and the issue on the validity of the order for sale came to a close with the Court of Appeal's decision in W-02-642-95. Thus, the order of sale was unimpeached and valid. Where securities are given for a debt upon which bankruptcy proceedings are based, the granting of adjudication and receiving orders against the debtor are not precluded before the realisation of the properties. Consequently, a stay pending the determination of this originating summons pending the actual sale of the charged properties was also not sustainable.

[c] Stay pending determination of Suit No. D5-22-1120-92

As it was not in issue that the judgment debt was still not satisfied, and not the subject matter of a stay, the creditor's recourse to bankruptcy proceedings for non-satisfaction of the debt was legitimate and within its legal rights. It should not be further stayed pending whatever further steps the debtor chose to take consequent upon the senior assistant registrar's decision to strike out this suit. Thus, the application to stay the bankruptcy action on this ground also did not constitute a special circumstance warranting the granting of a stay of this bankruptcy action.

[3] The practical effect of a stay of "all proceedings" of this bankruptcy action as prayed for by the debtor would place the parties in a stalemate position which was not in the interest of the parties. Justice was best served by disposing of all the pending applications.

[Appeal allowed; order of senior assistant registrar set aside with costs.]

Case(s) referred to:
Bank Bumiputra Malaysia Bhd v. Doric Development [1988] 1 CLJ 311 ***(refd)***
Bank Bumiputra Malaysia Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank [1977] 1 MLJ 77 ***(refd)***
Re Dato' Mohd Pilus Yusof, ex p Southern Bank Bhd [1988] 1 CLJ 102 ***(refd)***
Re Mat Sani Hamid, ex p United Asian Bank Bhd [1993] 1 CLJ 202 ***(refd)***
Re Tosrin Jarvanthi, ex p Equity Finance Bhd [1989] 2 CLJ 1057 ***(refd)***
Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155 ***(refd)***
Tan Seow San v. Ong & Co (Pte) Ltd [1982] 1 CLJ 157 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 97
Rules of the High Court 1980, O. 14, O. 18 r. 19

For the appellant/debtor - Saranjit Singh; M/s Jayaraman Ong & Co
For the respondent/creditor - WM Lee; M/s Shook Lin & Bok

Reported by Cindy Chan

JUDGMENT

Zaleha Zahari J:

Enclosure (66) is an appeal against the senior assistant registrar's decision dated 23 November 1996 in granting an order-in-terms of two applications for stay filed on 19 April 1993 (encl. (36)), and that filed on 16 November 1995 (encl. (46)), by the judgment debtor, J Raju Jayaraman a/l Kerpaya (hereinafter referred to as the "judgment debtor").

The prayers sought by the judgment debtor in these two application reads as follows:

Enclosure 36

That all proceedings in the above Bankruptcy action and or the Creditor's Petition be stayed until after due determination of:

(a) The proceedings in Kuala Lumpur High Court Suit No. S3-22-583-92;

(b) The proceedings in Kuala Lumpur High Court Originating Summons No. 31-1069-92;

(c) The proceedings in Kuala Lumpur High Court Civil Suit No. D5-22-1120-92.

Enclosure (46)

That all bankruptcy proceedings against the Judgment Debtor be further stayed until the determination of Court of Appeal No: 03-20-94.

It is common ground that Court of Appeal No. 03-20-94 has been renumbered as "W-02 642-95".

On 12 November 1997 I allowed OCBC Bank (Malaysia) Berhad's (hereinafter referred to as the "judgment creditor") appeal and set aside the senior assistant registrar's decision. My reasons are as follows:

The Law

The judgment debtor's applications under encls. (36) and (46) for stay are made pursuant to s. 97 of the Bankruptcy Act 1967 which states:

> The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

There is no doubt that a judge is vested with jurisdiction to stay proceedings under a bankruptcy petition, albeit discretionary, where a judgment debtor has successfully shown sufficient reason. However, in exercising such a discretion, on being moved by an application by the judgment debtor, as in this case, the judge has to take into account factors which are relevant surrounding the circumstances of the institution of the institution of the bankruptcy petition.

Before I turn to the facts and the circumstances in this case I propose to set out briefly well settled principles that must be applied to the issues raised in this application. The following principles emerges from the authorities cited by both counsels and may be summarised as follows:

(a) that under s. 3(1)(i) of the Bankruptcy Act 1967 a debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order for any amount and execution thereon not having been stayed has served upon him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the judgment. The debtor has seven (7) days after service of the notice to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid;

(b) that bankruptcy proceedings are meant to be expeditiously disposed of and the court has to ensure that delays are to be avoided or minimised once it has been instituted and that adjournments which are too long is equated to a stay being given (*Re Dato' Mohd Pilus bin Yusof Ex parte Southern Bank Berhad* [1988] 1 CLJ 102);

(c) that the court has to attach sufficient weight to the importance in bankruptcy proceedings of minimising delays as the primary purpose of such proceedings is to enable an independent person (Official Receiver) to ascertain and preserve all of the assets of the debtor and to ascertain who are the creditors and in what amounts with a view to a fair distribution of the assets to the creditors and the payment, so far as possible, of the sums owing to them, *pari passu*; the longer the delay through adjournments the greater the difficulties and anomalies;

(d) that there must be special circumstances to justify a stay of the bankruptcy proceedings;

(e) that the court must give weight or sufficient weight to the *prima facie* right of a petitioning creditor to obtain a receiving order on a duly presented petition (*Re Tosrin bin Jarvanthi Ex parte Equity Finance Bhd.* [1989] 2 CLJ 1057; *Bank Bumiputra Malaysia Bhd v. Esah binte Abdul Ghani* [1985] 2 CLJ 409; [1986] 1 MLJ 16;

(f) that even where there are securities given for the debt upon which the bankruptcy proceedings are based, that would not preclude the granting of Adjudication and Receiving Orders against the debtor before realisation of the properties (*Re Tosrin bin Jarvanthi; Bank Bumiputra Malaysia Bhd. v. Doric Development* [1988] 1 CLJ 311);

(g) that in cases where the *bona fides* of the applicant is in doubt, an application for adjournment should not be allowed (*Re Mat Sani bin Hamid Ex parte United Asian Bank Bhd.* [1993] 1 CLJ 202; however, upon being shown sufficient cause or reasonable ground, the court has the discretion to order a postponement and sufficient cause will be, *inter alia*, a genuine offer to settle the amount claimed (*Re Dato' Mohd Pilus bin Yusof*); and

(h) that the fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon a petition and that the court in exercising its jurisdiction in bankruptcy proceedings cannot go behind the judgment (*Sovereign General Insurance Sdn. Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 MLJ 304).

Facts

I propose to set out briefly the main suits between the judgment creditor and the judgment debtor, chronologically, in accordance with its filing, as well as the applications filed by the judgment debtor in this bankruptcy petition, their respective status at the commencement of hearing and at the date of decision of encl. (66) in three tabular forms for ease of reference.

(a) Table I lists out the actions filed by the judgment creditor against the judgment debtor and/or Kredin Sdn Bhd., the applications filed therein, (except those filed in this bankruptcy petition) and the decisions made thereon.

(b) Table II lists out all of the applications filed by the judgment debtor in this bankruptcy petition.

(c) Table III lists out the three actions filed by the judgment debtor against the judgment creditor mentioned in encl. (36), and their development to date of decision of encl. (66).

TABLE I

Actions Filed By The Judgment Creditor Against

The Judgment Debtor

Item	Court Reference	Date of Filing	Parties	Subject Matter of Action	Development of Case
1	KL HC No. 23-948-86	11-4-86	OCBC v. 1) Kredin Sdn Bhd 2) J Raju @ Jayaraman 3) Mohd Salleh Yusoff	Claim for out standing loan granted to Kredin Sdn Bhd of whom Judgment Debtor were one of two guarantors	(a) Judgment in default entered against Salleh; (b) On **26.9.88** SAR entered O. 14 judgment against Kredin and Judgment Debtor (Exb. 'D' En. (22)) (c) Kredin and Judgment Debtor appealed to Judge-in-Chambers against the SAR's decision; (d) On 10.7.89 Dato' Zakaria Yatim J dismissed the Judgment Debtor's appeal (Exb. 'E' En. (22)). (e) On 8.3.90 Dato' Zakaria Yatim J. dismissed a Notice of Motion filed by the Judgment Debtor to reinstate his appeal with costs (Exb. 'F' En. (22)).
2	KLHC No: 31-1069-86	25-4-86	OCBC v. Kredin Sdn. Bhd	Charge action filed by Judgment Creditor to realize the security given by Kredin Sdn. Bhd. to satisfy the judgment debt.	(a) On **16-7-87** application for Order-for-Sale granted; (b) Defendant appealed against Order-for-Sale *vide* Supreme Court Civil Appeal No: 415-87.

					(c) On **7-3-88** Supreme Court dismissed Kredin's appeal upon it being withdrawn (Exb. 'I' En. (22)) (d) On **18-8-90** Judgment Debtor obtained an injunction restraining OCBC from disposing charged properties in KL High Court D3-22-1288-90. (e) On **7.10.95** Kredin obtained a stay of Order-for-Sale in KL High Court S3-22-583-92. (f) On **8.5.98** the Judgment Debtor served on the Judgment Creditor an application to review the reserve price from RM108 million to RM182 million; hearing of application fixed on 12.8.92. (g) Summons-for-Directions of auction heard on 9.5.97. Nb: At the end of hearing of En. (66) auction date of charged property now scheduled for 12.2.98; The Judgment Debtor's appeal against the SAR's decision was then still pending.

3	B'cy Petition No. 29-1021-89	18-7-89	Re: J. Raju @ Jayaraman s/o M Kerpaya Ex Parte OCBC	Bankruptcy proceedings instituted for failure to settle judgment sum obtained in item (I) above. Bankruptcy Notice issued.	To date not disposed of by reason of the applications filed by the Judgment Debtor as listed in Table II below.

TABLE II

Applications Filed By The Judgment Debtor

In This Bankruptcy Petition

Item	Enclosure No.	Date of Filing	Subject Matter of Action	Development of Application
1.	10	24-5-90	Notice of motion by Judgment Debtor to: (a) strike out Bankruptcy Notice; (b) that all proceedings be stayed and time to file affidavit be extended.	Fixed for hearing on 21.6.96. Pending at the commencement of hearing of En. (66)
2.	23	23-7-92	Notice of Motion by Judgment Debtor to set aside Creditor's Petition dated 30.6.90 for failure to comply with s. 5(2) of the Bankruptcy Act and the hearing of the Creditor's Petition be adjourned *sine die*.	Not served on the Judgment Creditor at the commencement of hearing of En. (66) Nb: This unserved application was withdrawn on 14.5.97.
3.	35	14-9-93	Judgment Debtor files application to oppose bankruptcy petition.	Pending at the commencement of hearing of En. (66).

4.	36	19-4-93	Judgment Debtor files Motion for stay of bankruptcy proceedings	Served on Judgment Creditor at the same time as En. (46). (Item 7 below) Fixed for hearing on 21.6.96. SAR allowed application on 23-11-96 which is the subject matter of this appeal i.e. En. (66).
5.	37	19-4-93	Notice of motion by Judgment Debtor to set order of substituted service of Bankruptcy Notice.	Pending and unserved at the commencement of hearing of En. (66). Nb: Application was withdrawn on 14.5.97
6.	39	24-9-93	Judgment Debtor files application to stay bankruptcy proceedings pending realization of securities as charged properties were sufficient to satisfy debt.	Dismissed by the SAR on 29-10-93. On appeal to Judge-in-Chambers on 29-1-94, a limited stay of 6 months was granted w.e.f. making of the order. On 22.2.94 the Judgment Creditor appealed against the decision of the Judge dated 29.1.94
7.	46	16-11-95	Judgment Debtor files yet another application for stay pending disposal of Judgment Creditor's appeal to Court of Appeal *vide* No. 02-642-95.	Fixed for hearing on 21.6.96. Order-in- terms granted by SAR on 23-11-96, which is the subject matter of this appeal (i.e. En. (66))
8.	80	14-9-96	Summons-in-Chambers by Judgment Debtor to set aside the *ex parte* order dated 16-2-90 for, *inter alia*, extension of Bankruptcy Notice and substituted service (ie, similarto En. (37) above)	Pending at the commencement of hearing of En. (66)

9.	81	14-9-96	Summons in Chambers by Judgment Debtor to amend Notice of Motion (Encl. (10) ie, that listed as item 1 above)	Served on the Judgment Creditor on 3.2.97. Pending at the commencement of hearing of En. (66).
10	69	20-1-97	Summons in-Chambers by Judgment Debtor to strike out Appeal against Senior Assistant Registrar's decision dated 28-11-87 ie, En. (66).	Served on the Judgment Creditor on 3.2.97. Pending at the commencement of hearing at En. (66) Heard and dismissed on 24.3.97. En. (66) was then adjourned for hearing to 4.4.97.

TABLE III

Actions Filed By The Judgment Debtor Against

The Judgment Creditor

Item	Court Reference	Date of Filing	Parties	Subject Matter of Case	Development of Case
1.	KL High Court No. D3-22 1288-90 (exb. 'J' & 'K' En (22)	15-4-90	Kredin Sdn Bhd v. OCBC Corp. Ltd	Suit to set aside the Order-for-Sale dated 16-7-87 in KL High Court No. 31-1069-86 (ie, Item 2, Table 1 above)	(a) **18-8-90** Kredin obtains an *ex parte* injunction preventing Judgment Creditor from proceeding with the Order-for-Sale dated 16-7-87 obtained in KL High Court No. 3 1-1069-86 (ie, that listed as item 1 in Table I above) (b) **25-5-92:** VC George J ordered: (i) Kredin's claim be struck out and dismissed claim with costs;

					(ii) Injunction dated 18-8-90 and 15-4-90 was set aside; (iii) Kredin ordered to pay damages; (iv) Application for stay not allowed. (Exb. 'M' En. (22)).
2.	KL High Court No. S3-22-583-92	14-8-92	Kredin v. OCBC Bank Malaysia Bhd	Suit to set aside Order-for-sale dated 16-7-87 obtained in KL High Court No: OS No: 31-1069-86 Nb. This suit was filed about two and half months after YA Dato' VC George struck out D3-22-1288-90, as listed in item 1 above.	(a) **29-12-95:** Judgment Creditor files application to strike out writ. (b) **12-8-95:** Judgment Creditor's application to strike out was dismissed by YA Dato' Abdul Aziz J. (c) 14-10-95: Judgment Creditor appealed against Abdul Aziz J's order dated 12-8-95 to Court of Appeal *vide* 02-642-95. (d) **17-10-95:** Kredin obtains stay order of KL High Court No. 31-1069-86 by filing an application in this suit.

					(e) **23-4-97:** Judgment Creditor's appeal in 02-642-95 against Aziz's decision allowed by the Court of Appeal; Court of Appeal struck out this suit; matter held to be *res judicata;* stay of execution of Order-for-sale discharged. Nb: Kredin has filed Notice of Motion for leave to appeal to the Federal Court.
3	KL High Court No: D5-22-1120-92	14-8-92	(1) Raju @ Jayaraman (2) Kredin v. OCBC Ltd	Suit to set aside O. 14 judgment dated 26.9.88 in KL High Court No: 23-948-86 on ground of fraud (Item 1 Table I)	(a) **13-8-92:** Writ served on Judgment Creditor ie, on the last day before its expiration. (b) **5-9-93:** Judgment Creditor files application to strike out writ under O. 18 r. 19. (c) **Hearing** of O. 18 r. 19 application on 16.4.97 adjourned at Judgment Debtor's request. (d) **9.6.97:** Judgment Debtor served Summons-in-Chambers for stay of proceedings on Judgment Creditor.

					(e) Hearing of striking out application by Judgment Creditor adjourned on 10.6.97 at the request of the Judgment Debtor pending outcome of motion for leave to appeal to the Federal Court in relation to W-02-642-95. Matter was then adjourned to 30.6.97 (s). (f) 3.7.97: Judgment's Debtor's stay application adjourned at the request of the Judgment Debtor to reply to the Judgment Creditor's affidavit. Matter adjourned to 10.7.97. Hearing subsequently adjourned to 5.8.97. Nb (i) When Court commenced hearing of En. (66) the Judgment Creditor's application to strike out was still pending. (ii) On 20.9.97 the SAR allowed the Judgment Creditor's application to strike out the suit.

					(iii) The Judgment Debtor appealed to Judge-in-Chambers which appeal has been adjourned for hearing and is scheduled for hearing on 3.12.97 (iv) **9.6.97:** Judgment Debtor served unsealed application for stay of proceedings to await leave to appeal against Court of Appeal's decision in W-02 645-95 on Judgment Creditor.

Submissions Of Counsel For The Judgment Creditor

Cik Lee, counsel for the judgment creditor submitted that the orders sought under encls. (36) and encls. (46) ought not to have been granted by the senior assistant registrar as the judgment debtor has failed to show "sufficient reason" as required under s. 97 of the Bankruptcy Act in the affidavit filed in support of his application. She submitted that on the facts, the background and the history of the case and the suits filed by the judgment debtor (as set out in Tables I, II, and III above), encls. (36) and (46) were bereft of *bona fides*, totally without merit, and that a stay, as matters now stand, was not appropriate. Her arguments are as follows:

(a) Why Stay At This Stage Not Appropriate

This bankruptcy proceedings was instituted about eight years ago on 18 July 1989. She submitted that this extensive length of postponement of the proceedings could be equated to the judgment debtor having been given a stay of proceedings for all these years. She drew the court's attention to the fact that despite enjoying this long hiatus, the judgment debtor had made no attempt to settle the judgment debt either directly or otherwise. On the contrary, the judgment debtor is actively seeking to prevent the judgment creditor from realising the security to settle the debt. The debt claimed under the Bankruptcy Notice dated 18 July 1989 of RM30,165,673.82 has now increased to almost

twofold the amount. In these circumstances she submitted that it would be in the interest of justice to proceed with the matter on the adjudication of the bankruptcy action as the longer the delay through adjournments the greater the difficulties and anomalies arising from the fact that bankruptcy proceedings are not confined to the parties but will also affect the general public (*Tan Seow San v. Ong & Co. (Pte) Ltd* [1982] 1 CLJ 157; *Re A Debtor (No. 72 of 1984)* WLR 1143 at 1150).

She further submitted that the judgment creditor who had already obtained judgment against the judgment debtor on 26 September 1988 is also entitled to justice from the court. On the facts of this case the judgment debtor had clearly committed an act of bankruptcy on 4 May 1990 in failing to comply with the Bankruptcy Notice, and as such, the petitioning creditor has a prima right to an order unless the debtor has established some very special circumstances which would justify the court in departing from its usual practice (*Tan Seow Tan v. Ong & Co (Pte.)* at p. 158).

In this context she submitted that a stay of the bankruptcy proceedings at this juncture does not help to resolve matters but merely serves to jam up the court proceedings and to put a lid on the adjudication of whether the judgment debtor has valid grounds to oppose the making of the bankruptcy order. She urged the court to allow the bankruptcy proceedings to run its course by attending to the numerous applications filed by the judgment debtor over the years to impugn the validity of the Bankruptcy Notice and oppose the creditor's petition, which, in any case, came first in point of time and should be disposed of in that order. On this issue she concluded by saying that, if, and only if, all of the judgment debtor's applications have all been disposed of in the judgment creditor's favour, need the court then decide on whether the circumstances justify a stay of the proceedings.

(b) Lack Of *Bona fides*

It was also the judgment creditor's case that there was a total lack of *bona fides* on the part of the judgment debtor. She drew the court's attention to the fact that the only application dealt with in this bankruptcy proceedings are the stay applications filed by the judgment debtor namely, encls. (39), (36) and (46), whilst earlier applications filed by the judgment debtor have been "scuttled" for one reason or another.

The court's attention was drawn to the fact that encls. (36) and (46) were not the only two stay applications filed by the judgment debtor. One, filed on 7 October 1993 (ie, six months after encl. (36)), encl. (39), was given a return date about three weeks thereafter, ie, 27 October 1993. Both, encls. (39) and (36), has made reference to the charge action ie, O.S. No: 31-1069-86, but encl. (39) was premised differently. The application for the stay in encl. (39) reads as follows:

1. All bankruptcy proceedings against the Judgment Creditor be stayed pending realization of the security held by the Judgment Creditor.

Enclosure (39) was heard within a month of its filing. On 29 October 1993 the learned senior assistant registrar dismissed the judgment debtor's application from which decision the judgment creditor appealed to a judge-in-chambers. On appeal before YA Justice T. Selventhiranathan, on 29 January 1994, the judgment debtor successfully obtained a limited stay when the judge made the following order:

Court: Appeal allowed in terms of notice of appeal. Stay granted in terms of Enclosure (39) under section 97 of Bankruptcy Act for a period of 6 months from today. Costs in the cause.

Encik Matthew: Is there liberty for both parties to apply?

Court: On clarification being sought, stay of six months is in respect of bankruptcy proceedings under section 97 Bankruptcy Act.

As to why the judgment debtor preferred to pursue the later application, encl. (39), instead of encl. (36) (which was filed six months earlier on 19 April 1993) and was heard ahead of encl. (36), and as to why it was not extracted by the judgment debtor and which was served on the judgment creditor only in 1996 together with encl. (46), nor as to why the court gave the first return date about two years ten months later (ie, on 12 January 1996) is not clear.

Be that as it may Cik Lee submitted that it is pertinent to note that the basis of the stay in encl. (39), that the security of the charge would have satisfied the debt, is the antithesis of requiring a stay pending the determination of a suit to set aside the order-for-sale (ie, Suit No: S3-22-585-92) which is one of the three grounds cited in encl. (36).

Further, the court's attention was drawn to the fact that, to date, the judgment debtor (as the principal behind the chargor, Kredin Sdn Bhd.) has successfully prevented the judgment creditor from realising the properties charged as security for the judgment debt by obtaining injunctions and stays under new suits filed to set aside the order-for-sale dated 16 July 1987 (Suit No: D3-22-1288-90 and S3-22-583-92). According to counsel for the judgment creditor these actions by the judgment debtor reflected the total lack of *bona fides* on the part of the judgment debtor. The order-for-sale granted on 16 July 1987 is thus suffering from the same fate as this bankruptcy proceedings ie, the order is still far from being enforced some 10 years after it was granted.

Cik Lee also drew the court's attention to the fact that although the second suit to set aside the order-for-sale (ie, Suit No: S3-22-583-92) has been struck out upon the Court of Appeal allowing the appeal of the judgment creditor on 23 April 1997 under appeal No: W02-642-95, the chargor Kredin Sdn. Bhd.

has and is relentlessly pursuing the course of having the order-for-sale set aside, and in this connection, has since filed a notice of motion for leave to appeal to the Federal Court.

In the light of these development it was the judgment creditor's case that it is totally and inherently improbable that the judgment debtor intends to allow the charged properties to be realised to settle the debt which form the basis of this bankruptcy proceedings although on record he is saying that the realisation of the said properties (Current Reserve Price: RM108 million) would be more than sufficient to settle the said debt, and for this reason, a stay ought to be given. In this context, Cik Lee submitted that the ground of staying the bankruptcy proceedings pending determination of OS-31-1069-86 is a sham.

In addition, as the chargor is Kredin Sdn. Bhd. and not the judgment debtor, who, as guarantor, had personally stood surety for the loan, he therefore ought to be accountable for it. Case law on this issue, according to her, have consistently held that the judgment creditor should not be fettered in the exercise of its rights to simultaneously seek remedy against all securities furnished to it (*Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani; Re Tosrin bin Javanti*).

She further submitted that when the earlier encl. (39) stay application is taken into consideration, the completely contradictory grounds in applying for a stay in encl. (36), manifest the impropriety of the application. Having informed the court and obtained an order to allow a stay on the pretext of settling the debt through realisation of the properties, and yet at the same time, to actively pursue a course of action to defeat the realisation itself is highly improper and evidence of non-*bona fide* conduct. The proposition for a stay pending determination of a suit to set aside the order for sale should not be accepted nor allowed when the said suit (ie, Suit No. S3-22-583-92) cannot and has no bearing and is totally irrelevant to the bankruptcy proceedings herein.

It was her further submission that even if the judgment debtor had succeeded in setting aside the order-for-sale under the suit or upon appeal (ie, W02-624-95) that would not have any relevance to this bankruptcy proceedings nor detract from the fact that the judgment debt is still owing by the judgment debtor and a *fortiori*, the court ought to grant the receiving and adjudication orders. Hence there is no reason to await the determination of Suit No. 22-583-92 nor its appeal to the Court of Appeal.

As to the judgment debtor's contention that the suit is relevant as the sum claimed in the order-for-sale was incorrect and amounts to unjust enrichment to the judgment creditor, and as such, the order-for-sale ought to be set aside, Ms Lee submitted that an order-for-sale is not a judgment (*Low Lee Lian v. Ban Hin Lee Bank* [1977] 1 MLJ 77). According to her, even if the sum

claimed in the order-for-sale is wrong (which is not admitted) that will only result in an adjustment of the amount in the order-for-sale. However on the facts of this case that situation will not arise as the Court of Appeal in Civil Appeal No. 02-624-95 has already ruled that the matter is *res judicata* and struck out Suit No. S3-22-583-92.

In any event, as both Suit No. S3-22-583-92 and Civil Appeal No. W-02-642-95 have already been concluded these two bases for stay under encls. (36) and (46) no longer hold.

Submissions Of Counsel For The Judgment Debtor

It would appear from the submission of Encik Saranjit, counsel for the judgment debtor, that, in general, parties are on common ground as to the principles that the court should apply in granting a stay. The question is, on the facts presented before the court in this case, whether it is a proper case for its exercise.

Encik Saranjit submitted that, in exercising its discretion whether to grant a stay or not to grant a stay, a judge has to take into account factors which are relevant surrounding the circumstances of the institution of the bankruptcy petition. According to him the relevant circumstances that the court should take into consideration are these:

(a) the fact that the judgment debtor had filed a civil suit, ie, Kuala Lumpur High Court No. S3-22-583-92 (Item 2 Table III) for the setting aside of the order-for-sale obtained by the judgment creditor against Kredin Sdn Bhd. in which suit:

(i) YA Justice Dato' Abdul Aziz b. Mohamad had, on 12 August 1995 dismissed the judgment creditor's application to strike out suit S3-22-583-92; and

(ii) notwithstanding the reversal of Y.A. Dato' Abdul Aziz'z judgment by the Court of Appeal on 23 April 1997 this court should not permit the enforcement of this nine year old O. 14 judgment by reason of the fact that the judgment debtor intends to take the matter further up on appeal to the Federal Court;

(b) the fact that the judgment debtor had simultaneously, on the same date as the filing of S3-22-583-92, filed Kuala Lumpur High Court Suit No. D5-1120-92 (Item 3, Table III) whereby the judgment debtor sought to set aside the O. 14 judgment dated 26 September 1988 obtained by the petitioning creditor in Kuala Lumpur High Court No. 23-948-86 (Item 1, Table I) (the judgment upon which this bankruptcy petition rests) on the ground that the judgment had been fraudulently obtained;

(c) the fact that the judgment creditor are taking steps to proceed with the auction of the charged lands subjected to the order-for-sale of 16 July 1987 and is at the stage of summons-for-directions and determination of the reserve price;

(d) that it was prudent to await the outcome of the auction sale of the charged properties as only then would the monies payable by the borrower/chargor be capable of being ascertained should there be a deficiency after realisation of the charged properties;

(e) That on the construction of the facts and the law this court should hold that a guarantor's liability is subject to the security documents, and that on a proper construction of the security documents the claim of the judgment creditor was wrongful and in breach of contract and statute and that the judgment debtor, as guarantor, was only liable for the shortfall after the sale of the properties;

(f) that it would be prudent and consistent with contractual documents for the judgment creditor not to proceed with this bankruptcy proceedings, at least, until the successful sale of the properties.

Counsel for the judgment debtor submitted that the institution of the bankruptcy proceedings is premature and that it would be inequitable to allow the judgment creditor to proceed with this bankruptcy proceedings. He further submitted that there was no justification to proceed with this bankruptcy proceedings in such unholy haste when the money allegedly due to the judgment creditor could be recovered after the auction of the charged properties on 17 September 1997, which, according to him, would leave a surplus of not less than RM70,000,000 if the property is sold at RM108,000,000, which is at the lower end of the valuation.

It was Encik Saranjit's further submission that the judgment creditor cannot complain of any delay in bankruptcy proceedings due to previous orders of court in staying proceedings or any order of the court staying the enforcement of the charge from selling the charged properties and these orders should not be attributed to the judgment debtor as a ploy to delay matters. According to him the judgment debtor, in instituting all these suits, was but exercising, his entitlement to take all and any steps to ensure that justice was done to him.

Encik Saranjit submitted that bankruptcy proceedings should not be used as a tool of oppression and collateral motives. He contended that as the judgment debtor was but exercising his strict legal rights to ward off the bankruptcy proceedings and challenging a judgment for fraud and unjust enrichment. The judgment debtor therefore, according to him, cannot therefore be said to be "in the way" or "obstructing" the judgment creditor to enjoy the fruits of the judgment.

In conclusion counsel for the judgment debtor urged the court to confirm the order for stay granted by the senior assistant registrar and that the appeal of the judgment creditor be dismissed with costs.

Findings

I have given careful consideration to the facts, suits and applications filed as well as the decisions on appeal and took note of their current status and the arguments presented before me. I propose to set out my findings on encl. (46) first, followed by that in encl. (36). My decision are as follows:

Enclosure 46

With regard to the judgment debtor's application for stay pending the disposal of the judgment creditor's appeal against Dato' Abdul Aziz's decision dated 12 August 1995 dismissing the judgment creditor's application to strike out *vide* Court of Appeal No. W02-642-95, this can easily be disposed of.

On this issue I hold that in the light of the fact the Court of Appeal had already disposed of the judgment creditor's appeal on 23 April 1997 whereby they allowed the judgment creditor's appeal and further directed Kuala Lumpur High Court No. S3-22-583-92 to be struck out pursuant to O. 18 r. 19 Rules of the High Court 1980, I am in agreement with the submission of counsel for the judgment creditor that the basis of stay of this bankruptcy petition on this ground has been extinguished. An order of stay on this ground is therefore no longer sustainable.

Enclosure (36)

As to the application for stay pending the disposal of the three suits named in encl. (36) I will deal with each of them in turn.

(a) Stay Pending Disposal High Court Civil Suit No. S3-22-583-92

As to ground (a), (ie, stay pending the disposal of Kuala Lumpur High Court Suit No. S3-22-583-92) a stay on this ground clearly is related to the stay in encl. (46).

As far as this court is concerned effect must be given to the Court of Appeal's decision in allowing the judgment creditor's appeal in W-02-642-95. This court is bound and must accept and give effect to that judgment as the Court of Appeal's decision is binding upon it. The judgment debtor's Suit No. S3-22-583-92 has already been struck out and dismissed. Thus, for all intents and purposes Suit No S3-22-583-92 has therefore effectively been disposed of. In these circumstance a stay of this bankruptcy petition pending determination of a suit which has already been disposed of, is also, in my view, no longer sustainable.

(b) Stay Pending Determination Of Kuala Lumpur High Court O.S. No. 31-1069-86

As for O.S. 31-1069-86, the position that this court takes is that it has already been disposed of way back in 1987 when an order-in terms of the originating summons was granted on 16 July 1987 after what appears to be a vigorously contested *inter partes* hearing. This order-for-sale was fortified upon Kredin's appeal to the Supreme Court to the Supreme Court *vide* Supreme Civil Appeal No. 415-87 being dismissed by the Supreme Court consequential upon it being withdrawn.

In a normal case the matter would rest there. Effect would be given to the order-for-sale. The charged properties would then proceed to be sold pursuant to directions given by the senior assistant registrar.

This case however is an unusual one. The validity of the order-for sale made in this originating summons was tested in the first suit filed by the judgment debtor to set aside the order-for-sale ie, Kuala Lumpur High Court Civil Suit No. D3-22-1128-90. It was unsuccessful when, on 25 May 1992, VC George J directed this first challenge to be struck out and the judgment debtor's claim be dismissed with costs (See Item 1 Table III).

The court notes that the validity of the order-for-sale was retested in the second civil filed by the judgment debtor to set aside the order-for-sale ie, Kuala Lumpur High Court No. 22-583-92. This case was also dismissed summarily. It came to a quick close with the Court of Appeal's decision in W-02-642-95, as referred to earlier, when they allowed the judgment creditor's appeal and struck out and dismissed the judgment debtor's claim.

Thus, ten years after the judgment creditor had obtained the order-for-sale, notwithstanding the repetitive and continuous suits upon suits and applications upon applications as well as appeals against decisions filed in respect of them, the order-for-sale obtained by the judgment creditor on 16 July 1987 in this originating summons stands unimpeached and still valid.

In these circumstances I am of the view that the ongoing action to auction the charged properties by the judgment creditor are proper and valid in law. The court notes that the fixing of the reserve price appears to be hotly contested.

As for the suggestion and contention by the judgment debtor that all pending proceedings in this bankruptcy petition be stayed pending the auction sale of the charged properties as only then the actual amount due from the judgment debtor would be truly ascertained, I am of the view that such a course of action would be contrary to the established authorities of *Re Tosrin b.*

Jarvanthi, Ex Parte Equity Finance Bhd [1989] 2 CLJ 1057 and *Bank Bumiputra Malaysia Bhd v. Doric Development* [1988] 1 CLJ 311. These authorities clearly does not support such a proposition. On the contrary it lays down the principles that where securities are given for the debt upon which the bankruptcy proceedings are based, this would not preclude the granting of adjucation and receiving orders against the debtor before realisation of the properties.

In these circumstances I am constrained to hold that a stay pending the determination of this originating summons pending the actual sale of the charged properties pursuant to the enforcement of the order-for-sale is also not sustainable in the light of the events that have transpired subsequent to its issuance on 16 July 1987.

(c) Stay Pending Determination Of Kuala Lumpur High Court Civil Suit No. D5-22-1120-92

Coming now to the application for stay in para. (c) encl. (36) ie, pending determination of Suit D5-22-1120-92.

On this issue the court must of course take into consideration the development of this case from date of its filing and its current status which briefly are as follows:

(a) that this suit was filed after Suit No. D3-22-1288-90 (the first suit of the judgment debtor to set aside the order-for-sale) was struck out and dismissed with costs by VC George J;

(b) that the O. 14 judgment in issue was entered after a vigorously contested *inter partes* hearing and that the judgment creditor has not been able to enforce the same by reason of having to defend the judgment debtor's suits, applications, as well as appeals, over the past nine years;

(c) that by this suit, the judgment debtor is attempting to have the whole matter relitigated allegedly on the ground of fraud;

(d) that this suit to impeach the nine year old judgment has now been struck out by the senior assistant registrar on 20 September 1997 and is pending appeal to a judge-in-chambers;

It was suggested by counsel for the judgment debtor that, although there was a judgment, the court should not accept the O. 14 judgment to be a valid judgment by reason of the fresh allegation of fraud raised by the judgment debtor.

On this issue I am of the view that it cannot be doubted that a judgment is *prima facie* evidence of a debt. That a judgment or order, which had been fought *inter partes*, and subsequently affirmed on appeal, is in a far stronger position against the debtor of the validity of the debt for which it purports to be given.

As it is not in issue that the judgment debt in issue is still not satisfied, and not the subject matter of any stay, I am of the view the judgment creditor's recourse to bankruptcy proceedings for non satisfaction of the judgment debt in the first place was legitimate and within its legal rights. I further hold that it should not be further stayed pending whatever further steps the judgment debtor choose to take consequent upon the senior assistant registrar's decision to strike out this suit. Thus, in my judgment, the application to stay the bankruptcy action on this ground also does not constitute a special circumstance warranting the granting of a stay of this bankruptcy action.

To sum up, it cannot be denied that the repetitive and continuous suits upon suits, applications upon applications for almost similar relief and orders filed by the judgment debtor against the judgment creditor, as well as appeals filed against decisions made in respect of them, effectively means that the judgment debtor has enjoyed a stay all these years resulting in this bankruptcy proceeding not being disposed of since 1989 which clearly is contrary to the principle that bankruptcy proceedings are to be disposed of expeditiously and delay to be avoided once it has been instituted *(Re Dato' Mohd Pilus).*

Taking into account all of the surrounding circumstances of the institution of the bankruptcy petition, as well as the events these past ten years, I hold that no sufficient reason has been shown warranting the granting of a stay if these bankruptcy proceedings as applied for in encl. (36).

Effect Of Stay On Pending Applications Filed By The Judgment Debtor

I am further of the view that an order for stay should not be granted for the following reasons.

At the outset of hearing of encl. (66) the status of the applications filed by the judgment debtor in this bankruptcy petition are as set out in Table II. An examination of Table II would show that at the commencement of hearing of this appeal six applications filed by the judgment creditor were then still pending.

If one were to age the applications, the earliest, encl. (10), was filed on 24 May 1990, the application to strike out the bankruptcy notice as well as an application for stay of proceedings. Enclosure (10) thus has been pending for the past seven years. The court also observes that the judgment debtor had,

on 14 September 1996, also filed an application to amend this seven year old application (ie, encl. (81). The most recent application filed by the judgment debtor in encl. (69), filed on 20 January 1997, by which application the judgment sought to strike out encl. (66) this appeal itself!

The impact of the decision of the senior assistant registrar to stay "all proceedings" in this bankruptcy petition would therefore affect all of these pending applications. When counsel for the judgment debtor was questioned by the court at the outset of the hearing of this appeal as to whether he was still interested in proceeding with all of these applications Encik Saranjit could not give an immediate reply. He sought an adjournment to obtain instructions which application was allowed by the court.

Thereafter, at the subsequent hearing date of 14 June 1997, the judgment debtor withdrew only two of pending applications, ie, encls. (23) (Item 2 Table II, notice of motion to set aside the judgment creditor's petition) and encl. (37) (Item 5 Table II, notice of motion to set aside the order of substituted service of the bankruptcy notice). Thus there were four more applications of the judgment debtor's application still pending which would come to a grinding halt should this appeal be dismissed and the decision of the senior assistant registrar's, upheld ie, encls. (10), (69), (80), and (81).

By consent of parties this court proceeded to hear encl. (69), the application of the judgment debtor to strike out encl. (66) notwithstanding the stay order granted by the senior assistant registrar. After hearing submissions of both counsels the application of the judgment debtor to strike out encl. (66) was dismissed by me on 24 March 1997 with costs.

To grant a stay of "all proceedings" of this bankruptcy action as prayed for by the judgment debtor at this stage would mean that the judgment debtor is desirous of obtaining an order to stop this court from proceeding with the hearing of all of the applications which the judgment debtor himself is still desirous of proceeding, *inter alia*, encl. (10), which has not been disposed of for the past seven years! The practical effect of a stay would therefore bring the disposal of this bankruptcy petition to a stalemate position as it would effectively bring to a stop the disposal of all of the judgment debtor's applications as well!

I am of the considered opinion that it cannot be in the interest of the judgment creditor, nor of the judgment debtor, to be placed in such a stalemate position. I hold that justice is best served for the court to proceed to hear and dispose of all of these pending applications and not for them to be held in abeyance pending whatever decision the judgment debtor choose to take arising from the Court of Appeal's decision in W-02-642-95 on 23 April 1997 as well as arising from the decision of the senior assistant registrar's decision to strike out suit No. D5-22-1120-92 on 20 September 1997.

In these circumstances the appeal of the judgment creditor is accordingly allowed and order dated 23 November 1996 of the senior assistant is hereby set aside with costs.